

# Minutes for Meeting #10 Government Industry Advisory Panel (29 Nov 16)

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## *Section 813, FY16 NDAA, Rights in Technical Data*

### ATTENDEES:

- **Panel Members:** Richard Ginman (Chair), Richard Gray, Charles Harris, Kelly Kyes, James McEwen, Roger Hamerlinck, Sean O'Brien, Dora Hancock, Thomas Dee, Elliott Branch, Joseph Gordon, Bill Elkington, Alison Brown
- **Support Staff:** LTC Andrew Lunoff (DFO), Mike Canales
- **Public:** Nancy Kremers, Josh Krotec, Jon Etherton, Karen Wilson
- **Public (On Telecon):** George Winborne, James Haag, Bill Decker, Rob Williams, Barry Edelberg, Ryan Agergard,

### INTRODUCTIONS

- Introduced everyone – including those on the telephone

No presentations occurred during this session. The panel focused on finalizing tension points between government and industry that were identified in received public comments and briefings. The resulting documents can be found at the following FACA database location under the titles of "Tension Point Matrix" and "10 USC 2320 Working Document" (pages 8-10):

<https://database.faca.gov/committee/meetingdocuments.aspx?flr=147541&cid=2561>

### Panel Discussion on Tension Point Topics:

#### 3.a. Data Rights as an Evaluation Factor:

- Variables can be unknown for contractors and can't force to become response
- If it is not a statutory issue, how do we change behavior?
  - Change behavior through training and adjustments to regulations and guidebooks
- There is a tension within the topic of getting the best and newest technology and balancing life cycle support
  - Industry has deep technical knowledge on how it provides capability and the government wants to have design data to include models in making decisions
  - Part of the challenge is industry not even providing an opportunity to provide data to the customer
  - Industry does not have problem providing data but having knowledge used against them competitively
- Panel agreed on white paper and a need to place in statute

#### 4.a.vi. Commercial Items vs Non-Commercial Items

- Commercial suppliers and issues associated to Intellectual property especially with hardware and software
  - Commercial defined in FAR/DFARS

#### 2.a. Government Purpose Rights (GPR)

- Scope: Doctrine of segregability reaction of scope of GPR in fixed funding
  - What in scope is challenge?
  - More options in rights for mixed funding and can be used for any government purpose
  - This could be a regulatory solution or perhaps adding a fourth category of rights
  - Possibly encourage specially negotiated license rights
    - What is it that GPR gives us now?

#### 2.b. Depot –Level Challenges

- Operations, Maintenance, Installation & Training (OMIT) depot maintenance and OMIT Data Manufacturing
- Government sees complete depot level data including Form, Fit and Function, OMIT and Detailed Manufacturing and Process Data (DMPD)
- Need to change limited rights definition
- Develop a contingent license right for contractor who is asserting rights on data in depot
- Is it possible to use escrow in this area?
- Need to provide flexibility to change sustainment during acquisition life cycle
  - Priced Contract Option possible—either as an evaluation factor or total contracted price

#### 2.e. Access for limited purposes

- Need some kind of right and not necessarily GPR
- Rights to run through software for examples such as cyber review

#### 2.f. Software maintenance/sustainment requirements

- Needs to be added to 2320 and require source code data or DMPD
- Actually may need more than source code, no longer just procedural and objects
- 10 USC 2460: All aspects of software maintenance now classified by the DoD as of 1 Jul 95 as depot-level maintenance and repair
  - Examples: writing patches, bug fixes, etc.
  - Maintenance is not defined in DFARS anywhere and data will be needed
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#### 5.d. Software Form, Fit and Function

- Need to talk language that software firms understand
- Does wording from proposed language make sense to software developers?

#### 5.e. OMIT vs DMPD

- Need regulatory change to provide OMIT data
- Need to clearly define what OMIT data is
- Tension exists with commercial items
- Does government need unlimited rights in OMIT?

#### Other tension point discussions:

- Indirect cost pools are considered privately funded
  - Needs to be kept separate from IR&D tension point
- Need to find a way to keep CDRLs up to date beyond period of performance
- Significant difference between MOSA interface and interface for depot repairs
- Panel needs to determine what needs to be in statute vs regulation
- Current regulations already state industry cannot charge government license fee for rights already acquired
- Need to review 10 USC 2320 to see if tension points make sense
  - Is there flexibility to move away from funding and go to needs based?
  - Policy to create incentives for a long term consideration
- Need to continue IR&D discussion on how IP is effected through investments
  - Is there a case strategy example?

#### **Public Comment:**

##### Army Material Command Patent Attorney, Mr. George Winborne:

- Cannot dismiss language about not paying twice for data, as this sentiment of Congress has been around through multiple NDAA's (e.g. 2010, 2011)
- There are times when royalties are paid for during development and sometimes have to pay for twice

- Panel response: seems that it is defined as literally the same work, but how do other Services know what has been paid for and what has not been paid for?

**Panel Actions and Way Ahead:**

Identified tension points that were statutory and regulatory

- Statutory Tension Points (pages 8-10 in pdf): 3.a.; 5.a.
- Regulatory Tension Points:
  - 1.a.-1.d.: Business model concerns
  - 2.a.-2.i.: Acquisition planning and requirements
  - 3.b.-3.d.: Source selection concerns
  - 4.b., 4.c., 4.e.: Implementation concerns
- Not yet determined: 5.d.

Next Meeting: continue identifying tension points as statutory or regulatory, review 2320 and 2321 language and new NDAA

APPROVED: PANEL CHAIR, MR. RICHARD T. GINMAN

